

Respondent appealed and although it admits claimant suffered a work-related injury on September 8, 2009, it argues claimant only suffered a temporary aggravation to his preexisting right knee condition and his current condition as well as the need for medical treatment is the result of the preexisting knee condition.

Claimant argues that the sole issue is medical treatment and the Board does not have jurisdiction to address that issue upon appeal from a preliminary hearing. Claimant further argues that pursuant to K.S.A. 44-515, Dr. Stechshulte's report is not admissible. Finally, claimant requests the Board to affirm the ALJ's Order.

The issues before the Board on this appeal are (1) whether the Board has jurisdiction to review the preliminary hearing Order; (2) whether Dr. Stechschulte's medical report should be stricken from the record because claimant was not timely provided a copy; and, (3) whether claimant's September 8, 2009 accidental injury is the cause of his current condition and need for medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, claimant maintains the Board does not have the jurisdiction to review the preliminary hearing Order as the issue presented to the ALJ was claimant's entitlement to temporary total disability compensation and medical treatment. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.¹

A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. And a contention that the ALJ erred in finding the evidence established claimant is entitled to temporary total disability compensation is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the

¹ See K.S.A. 44-551.

furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

But in this instance, the issue raised was whether claimant's current condition and need for medical treatment was caused by the work-related accidental injury or was instead the natural and probable consequence of claimant's preexisting condition. The undersigned Board Member concludes the Board does have jurisdiction to review the preliminary hearing issue of whether an injured worker's symptoms stem from the work-related accident as that issue is, in essence, tantamount to whether a worker has sustained an injury that arises out of and in the course of employment.

Claimant next argues that Dr. Stechschulte's medical report introduced at the August 31, 2010, preliminary hearing was inadmissible because it was not timely provided to claimant after a request pursuant to K.S.A. 44-515(a).

Respondent's insurance carrier referred claimant to Dr. Stechschulte for an evaluation. The examination and evaluation took place on April 2, 2010. In a letter dated June 2, 2010 addressed to the insurance carrier's adjuster, a request was made for all medical records the carrier had concerning claimant.² Claimant's attorney followed up with a June 8, 2010 conversation with the insurance carrier's adjuster and specifically requested Dr. Stechschulte's report but the adjuster refused to provide the report.³ On approximately July 20, 2010, claimant's attorney received a copy of Dr. Stechschulte's report as an attachment to a July 16, 2010 letter from the insurance carrier's attorney.

K.S.A. 44-515 requires an employee to submit to an examination by a reputable health care provider during the pendency of the employee's claim for compensation. That statute further states:

(a) . . . Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer. . . .

. . . .
(c) Unless a report is furnished as provided in subsection (a) and unless there is a reasonable opportunity thereafter for the health care providers selected by the employee to participate in the examination in the presence of the health care providers selected by the employer, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

² P.H. Trans. (Aug. 31, 2010), Cl. Ex. 1.

³ *Id.*

As previously noted, on April 2, 2010, at respondent's request, claimant submitted to an examination by Dr. Stechschulte. A report of that examination dated April 2, 2010 and addressed to Deborah Brown, Senior Claims Representative for Gallagher Bassett Services, Inc., was offered as an exhibit at the August 31, 2010 preliminary hearing. Claimant's counsel objected to the report pursuant to K.S.A. 44-515 because neither claimant nor his attorney had been timely provided a copy of the report.

The following colloquy occurred at the preliminary hearing:

JUDGE HOWARD: I have received Claimant's 1 and Respondent's A. Claimant is requesting that Dr. Stechschulte's report not be considered on the basis of what?

MR. SMITH: A violation or noncompliance with the requirements of K.S.A. 44-515 requiring that the medical report be provided within 15 days.

The appointment took place on April 2. We submitted a request for the report. It's documented there in my letter to Gallagher Bassett under date of June 2nd. There's also a note from my file of a conversation with the adjuster on June 8 in which we discussed obtaining the report and she, again, declined to provide that report to us.

After the previous preliminary hearing, that report by Dr. Stechschulte was received by us on approximately July 20, accompanying a letter from Mr. Hobbs for the Respondent and Insurance Carrier under date of July 16.

JUDGE HOWARD: Very well. Anything else before we begin?⁴

The matter proceeded to hearing and the ALJ issued the Order but there was no ruling on claimant's objection to Dr. Stechschulte's report. Accordingly, it cannot be determined whether the ALJ considered that report in making his decision. And that is problematic on an appeal to the Board from a preliminary hearing.

Simply stated, the Board's de novo review is based upon the record and evidence presented to and considered by the ALJ.⁵ Absent a ruling by the ALJ on claimant's objection to introduction of Dr. Stechschulte's report it is impossible to determine if that report is part of the evidentiary record to be considered by this Board Member. Consequently, it is necessary to remand this matter to the ALJ for a ruling on claimant's objection to Dr. Stechschulte's report in order to determine whether it is part of the evidentiary record considered by the ALJ.

⁴ P.H. Trans. (Aug. 31, 2010) at 5-6.

⁵ See K.S.A. 44-555c(a).

For the sake of judicial economy the Board frequently attempts to determine if it can be implied from the Order what the ALJ determined, but in this instance that is not possible. And due to the limited authority and jurisdiction statutorily afforded the Board when reviewing findings from preliminary hearings, there is no authority for the Board to address the admissibility of the report at this juncture of the proceedings. As with other evidentiary questions at preliminary hearing, the ALJ is charged with the responsibility of determining whether evidence proffered should be admitted into evidence. That is an interlocutory order that is solely within the authority of the ALJ.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that this matter be remanded for a ruling on claimant's objection to Dr. Stechschulte's report.

IT IS SO ORDERED.

Dated this _____ day of December, 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2009 Supp. 44-555c(k).